

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: February 7, 2002

BALCA Case No. 2001-INA-117
ETA Case No. P1996-CA-09045996/AT

In the Matter of:

PHILL'S LAWN SERVICE,
Employer,

on behalf of

JESUS L. RAMIREZ,
Alien.

Appearance: Leonard W. Stitz, Esq.
Santa Ana, California

Certifying Officer: Pandora Wong
San Francisco, California

Before: Vittone, Burke and Wood
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Landscape Gardner.¹

STATEMENT OF THE CASE

On May 22, 1995, Employer, Phill's Lawn Service, filed an application on behalf of the Alien, Jesus L. Ramirez, to fill the position of Landscape Gardner. (AF 16). Eight years of grade school,

¹Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

a resume and two years of experience in the job offered were required.

The CO issued a Notice of Findings (NOF) on December 2, 1997. (AF 14) Citing 20 C.F.R. §656.20(c)(8), the CO proposed to deny certification because Employer had failed to establish that a bona fide job opening existed to which qualified U.S. workers could be referred. The CO determined that the position had been created for the Alien. The CO pointed out that Employer's business license had expired on January 1, 1995, and that the job site appeared to be Employer's home. There was no listing for Employer in the white or yellow pages of the telephone books and Employer was not registered with the State of California as a tax-paying entity.

Employer was advised that it could rebut the NOF by submitting (1) documentation that it was registered with the State of California as a tax-paying entity; (2) a copy of the current business license; and (3) evidence that Employer was performing and conducting business as a gardening and landscaping company. The CO questioned how many employees were located at Employer's address and in what capacity they were employed. The CO also questioned how Employer had performed the job duties of the position prior to the hiring and petitioning for the Alien.

Counsel for Employer and Employer submitted a rebuttal letter dated February 2, 1998. (AF 8). Therein, Employer provided his social security number, stating that this number verified that the business was paying taxes and registered with the State of California. Employer contended that the business license he submitted, which had expired, was the most current one, and that the city did not mandate renewal of the license every year. Employer also submitted a business card utilized by Employer to market his services. Employer explained that it did not have any current full-time employees, but was using several independent contractors to perform the services for which it was contracted. Due to an increase in business, Employer found it necessary to hire an additional worker.

The CO issued a Final Determination (FD) on February 22, 2001, finding that Employer had failed to satisfactorily rebut the NOF. (AF 6). Specifically, the CO found that (1) Employer's social security number did not meet the NOF requirement of showing proof of registration with the State of California as a tax-paying business; (2) no documentation was provided to show evidence of the fact that the business license did not need to be renewed every year; (3) the telephone number on Employer's business card was no longer in service and there was no forwarding telephone number; (4) Employer's rebuttal that there were no current employees employed full-time, and that independent contractors were utilized did not show evidence of the need for a full-time worker, nor did it show evidence of the existence of a job opportunity to which U.S. workers could be referred; and (5) no evidence had been provided that the worker Employer claimed it needed to hire was not an independent contractor, or that a permanent full-time worker was required to fulfill the terms and conditions of the labor application.

By letter dated March 23, 2001, Employer requested review of the denial of labor certification by the Board of Alien Labor Certification Appeals ("BALCA" or "Board"). (AF 1).

DISCUSSION

Employer bears the burden of proving that a position is permanent and full-time. If the employer's own evidence does not show that a position is permanent and full-time, certification may be denied. *Gerata Systems America, Inc.*, 1988-INA-344 (December 16, 1988) In the instant case, Employer was fully advised of the specific documentation needed to rebut the NOF. It failed to produce same. If a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full-time, the employer must provide it. *Collectors International, Ltd.*, 1989-INA-133 (December 14, 1989); *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*).

The documentation requested by the CO herein was reasonably requested, and relevant to the determination of whether the position at issue constituted full-time employment. Employer's failure to submit the documentation reasonably requested by the CO warrants denial of labor certification. *Rouber International*, 1991-INA-44 (March 31, 1994).

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel:

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.